

# **EXHIBIT E**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

JAMES HAYDEN,

Plaintiff,

-vs-

CASE NO. 1:17CV2635

2K GAMES, INC., et al.,

Defendants.

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Deposition of BERNARDINO TOVANCHE

Cleveland, Ohio

Wednesday, January 29, 2020 - 7:36 p.m.

Reported by:

Pamela S. Greenfield, RDR, CRR

Job No: 26860

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DEPOSITION OF: Bernardino Tovanche

DATE: Wednesday, January 29, 2020

TIME: 7:36 p.m.

LOCATION: McDonald Hopkins  
600 Superior Avenue East  
Suite 2100  
Cleveland, Ohio 44114

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23 Videographer:

24 Raymond Andrews, Jr., CLVS, CTP, Videographer

## I N D E X

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## EXAMINATION

BERNARDINO TOVANCHE

BY MS. MEANS

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BY MR. ALEXANDER

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1 THE VIDEOGRAPHER: We're going  
2 on the record. The time is 7:36 p.m.  
3 Today is January 29th, 2020. We're at 600  
4 East Superior Avenue in Cleveland, Ohio, to  
5 take the deposition of Bernardino Tovanche  
6 in the case titled James Hayden versus 2K  
7 Games, Inc. et al. in the U.S. District  
8 Court, Northern District of Ohio, Eastern  
9 Division. Case Number 1:17-CV-2635.

10 My name is Randy Andrews,  
11 videographer. Court reporter is Pam  
12 Greenfield.

13 Counsel present please identify  
14 themselves for the record.

15 MS. MEANS: My name is Miranda  
16 Means. I am counsel for the Defendants  
17 Take-Two Interactive Software and 2K Games  
18 and I'm accompanied by Josh Simmons who's  
19 also counsel for defendants.

20 MR. ALEXANDER: Andy Alexander  
21 from Calfee, Halter & Griswold representing  
22 Plaintiff James Hayden.

23 THE VIDEOGRAPHER: Would the  
24 court reporter, please swear in the  
25 witness.

1           BERNARDINO TOVANCHE, of lawful age, called  
2       by the Defendants for the purpose of  
3       cross-examination, as provided by the Rules of  
4       Civil Procedure, being by me first duly sworn, as  
5       hereinafter certified, deposed and said as  
6       follows:

7           CROSS-EXAMINATION OF BERNARDINO TOVANCHE

8       BY MS. MEANS:

9       Q.   Good evening, Mr. Tovanche.

10      A.   Good evening.

11      Q.   Thank you for coming in. I know it's late.

12           Could you please just state your name and  
13       address for the record?

14      A.   Sure. My name is Bernardino Tovanche. 4149  
15       Brookside Boulevard, Cleveland, Ohio 44135.

16      Q.   And is Andrew Alexander representing you today?

17      A.   Yes.

18           MR. ALEXANDER: Maybe I should  
19       clarify on the record that in addition to  
20       representing plaintiff in this matter, I am  
21       also representing Bernardino Tovanche in  
22       relation to the subpoena for deposition.

23      Q.   So I understand you came from work today?

24      A.   Yes.

25      Q.   Where do you currently work?



1 A. I work at Charles Schwab.

2 Q. And what do you do there?

3 A. Inbound call center rep.

4 Q. So were you previously a tattooist?

5 A. Yes.

6 Q. And do you currently still tattoo people?

7 A. Yes.

8 Q. Where do you work currently as a tattooist?

9 A. Focused Tattoos in Cleveland Heights.

10 Q. What's the address of that?

11 A. 1846 Coventry Road, Cleveland Heights, 44118.

12 Q. So did you go in and tattoo anybody today?

13 A. No.

14 Q. Okay. On a day-to-day basis, what kind of work  
15 do you do as a tattooist?

16 A. Just depends on what I have scheduled, what walks  
17 through the door, what the customers are looking  
18 for.

19 Q. Well, maybe let's talk about the last day you  
20 worked as a tattooist. When was that?

21 A. So let's see. That would probably be, I'm trying  
22 to think. Sunday.

23 Q. And how many clients did you see on Sunday?

24 A. I saw one to two maybe.

25 Q. So I've actually never been tattooed before so

1 bear with me a little bit.

2 A. Yep.

3 Q. When a client comes into your tattoo shop, what's  
4 the first thing that happens? Do they get any  
5 information?

6 MR. ALEXANDER: Objection.

7 Calls for speculation.

8 A. So it just depends on the interaction. Sometimes  
9 they want to just consult; but generally speaking  
10 I mean you would greet the, the client and then  
11 you'd ask, you know, what they were doing there  
12 and they'd say: I want to get tattooed. What  
13 kind of ideas do you have, you know.

14 Q. So do you find that a client typically comes in  
15 with an idea of what they want?

16 MR. ALEXANDER: Objection.

17 Vague. Calls for speculation.

18 A. It depends on the client.

19 Q. Would you say that most clients already come in  
20 knowing what they want?

21 MR. ALEXANDER: Objection.

22 Vague.

23 A. Not all the time. Sometimes yes, sometimes no.

24 Q. So when a client comes in with an idea of what  
25 they want inked on them, do you typically work

1 with them to sketch out that idea?

2 A. When a client comes in with an idea, yes, we  
3 would work with them so we would basically see  
4 what kind of ideas they have and then work back  
5 and forth until a, a design was agreed upon.

6 Q. And would you say that a client typically knows  
7 where on their body they want a tattoo when they  
8 come in to see you?

9 MR. ALEXANDER: Objection.

10 Incomplete hypothetical. Calls for  
11 speculation.

12 A. For the most part, yes.

13 Q. So when you work with a client to kind of sketch  
14 out their idea, do you do that on paper?

15 MR. ALEXANDER: Same objection.

16 A. That would depend artist to artist.

17 Are you asking me specifically or are you  
18 asking in general?

19 Q. Well, for you. Do you usually sketch things out  
20 on paper or do you work directly on the skin?

21 A. I work, I work mostly on my iPad right now.

22 Q. And then do you ever draw the tattoo out on the  
23 person before you start inking it?

24 A. Yes. Many times because the -- when, when you  
25 actually have to tailor something to the body,

1       it's, it's difficult to do it as a transfer  
2       sometimes so you have to basically draw it on  
3       sometimes because of size, things like that, just  
4       the way that it's forming to the body so you  
5       would have to use a marker. It flows better, for  
6       better lack of words, with the body.

7   Q.   So when you draw it out on your iPad first, does  
8       the client then approve the design?

9                   MR. ALEXANDER:  Objection.

10                Calls for speculation.  Incomplete  
11                hypothetical.

12   A.   Sometimes they, yeah, they like the design and  
13       want to go with it.  Sometimes they want to add  
14       to it or take away from it, depending, and they  
15       give me ideas and we kind of just customize it to  
16       what they like, so kind of like a process back  
17       and forth.

18   Q.   And then when you actually, when you sometimes  
19       draw it out on their body, do they have a chance  
20       to make adjustments to it?

21                   MR. ALEXANDER:  Objection.

22                Vague.  Incomplete hypothetical.  Calls for  
23                speculation.

24   A.   Well, any design once it's stenciled on the body,  
25       we make sure that the client approves of it

1 before we ink it so, yes, in that case if  
2 someone -- thing was drawn on the body, we'll, at  
3 that point we'd show it to the client, they would  
4 say yes, I'd like this or can we do this, can we  
5 move it up a little bit, can you change it this  
6 way and we just kind of tailor it to how, however  
7 they, you know, until they approve it.

8 Q. And that's because it's permanent, right?

9 MR. ALEXANDER: Objection.

10 Vague. Ambiguous.

11 A. The -- well, I mean that's because we have to  
12 make sure that we're doing a good piece of  
13 artwork on their body.

14 Q. But would you say that a client has to approve  
15 what they're getting on their body that's  
16 permanent?

17 MR. ALEXANDER: Objection.

18 Form. Vague and ambiguous.

19 A. Well, can you re -- can you say that again?

20 Q. Yeah. Let me back up.

21 So you work in permanent tattoos, right?

22 MR. ALEXANDER: Objection.

23 Form.

24 A. I suppose we can question permanence. You know,  
25 what's, what's really permanent? That's a

1 relative question.

2 I work in the tattoo industry and we create  
3 body art.

4 Q. So earlier you said that you want to make sure  
5 that the art is a good piece of art.

6 What would you say makes a piece of art good?

7 MR. ALEXANDER: Objection.

8 Incomplete hypothetical. Calls for  
9 speculation.

10 A. And that's, that's a relative question, too, but  
11 that's okay. I'll answer it.

12 Everyone has an idea of what a good piece of  
13 art is. You know, there's people all over and,  
14 you know, you might agree with what their tattoo  
15 looks like and that's, that's a great tattoo for  
16 them and you might not say that's it's a great  
17 tattoo for you so it's a relative question.

18 In terms of creating a good piece of art, I  
19 mean it comes from the artist. It comes from  
20 their, their mind. It comes from their years of  
21 knowledge. There's a lot that goes into it.  
22 It's craftsmanship really, so it just kind of  
23 really depends. I mean everyone has an idea of  
24 what a good piece of art might be; but if you're,  
25 if you're asking me what makes a good piece of

1 art, I would say the, the artist, you know, the  
2 way that they actually form it and we can go into  
3 many details about tattoos and what makes a good  
4 tattoo and what not, but, you know, if you want  
5 to ask that question, we can go into that as  
6 well; but in any case, in terms of art it's  
7 really up to, you know, ultimately you want to  
8 make sure that the client is satisfied with it  
9 and you are, want to be satisfied with your piece  
10 of work that you just created on, on their body.

11 Q. So the process you described of like working with  
12 the iPad --

13 A. Uh-huh.

14 Q. -- is that a process that other people at Focused  
15 Tattoos use?

16 A. Some do, some don't. It just really depends and  
17 varies on the artist because it goes from artist  
18 to artist so...

19 Q. And how many tattoo artists work there?

20 A. So right now there are seven artists and two  
21 apprentices.

22 Q. And who are they?

23 A. So artist-wise there is myself. Jim. There is  
24 Noah. Danielle. Matt. Donnie. Quiz.

25 Q. Do you remember last names of any of those

1 people?

2 A. So Matt and Donnie are brothers. Their last  
3 names are Madda. Danielle's last name is Stull.  
4 Quiz's last name is Parker. Let's see, who else  
5 did I say. Noah is Astrup. A-S-T-R-U-P. And  
6 then we have two apprentices.

7 Q. And who are the apprentices?

8 A. Macey Thompson. And then Jim's son is actually  
9 an apprentice, Jim Junior.

10 Q. Let's go back to what happens when a client walks  
11 in your tattoo shop.

12 So do you ask for identification?

13 A. Yes.

14 Q. And that's because you can't tattoo someone under  
15 the age of 18?

16 MR. ALEXANDER: Objection to  
17 foundation.

18 A. You, yeah, by law you have to ask for  
19 identification so...

20 Q. And do you have your clients sign anything when  
21 they come in?

22 A. Yes.

23 Q. What do they sign?

24 A. Consent forms.

25 MS. MEANS: We'd ask for the



1 production of those consent forms.

2 MR. ALEXANDER: I'll consider  
3 the request if you can point me to a  
4 document request in the subpoena.

5 BY MS. MEANS:

6 Q. And do you know what's contained in those consent  
7 forms?

8 A. So the consent form will have things like are you  
9 allergic to anything, do you have any type of  
10 diseases, anything that's going to preclude you  
11 from, you know, getting tattooed, you know,  
12 medications that you're taking. It's going to  
13 talk about, you know, have you eaten. Things  
14 like that.

15 Also it's going to say are you agreeing to  
16 artist's interpretation of your artwork.

17 Q. What does that mean, "Are you agreeing to  
18 artist's interpretation"?

19 A. Basically that the, that there is an agreed upon  
20 design but that the artist at the end has freedom  
21 with the tattoo so that's pretty much it.

22 MS. MEANS: I'm going to mark  
23 for identification Exhibit 1, Deposition  
24 Exhibit 1.

25 - - - -

1 (Thereupon, Defendants' Exhibit 1, Tovanche  
2 000001-003, Commercial Lease Agreement, was  
3 marked for purposes of identification.)

4 - - - -

5 A. Is that for me or you?

6 Q. This is for me. Oh, I'm sorry. We can put that  
7 aside for now.

8 A. Okay.

9 MS. MEANS: Let's mark Exhibit 2  
10 as well. We'll talk about that in a minute  
11 but let's do this one first.

12 - - - -

13 (Thereupon, Defendants' Exhibit 2, Hayden  
14 001944, Medical History/Consent Form, was  
15 marked for purposes of identification.)

16 - - - -

17 Q. So do you recognize this?

18 A. Something similar. Not really this one, though,  
19 no. No. We use a different one.

20 Q. So it says at the top "Focused Tattoo Medical  
21 History/Consent Form," right?

22 A. Yeah.

23 Q. So is this an example of a consent form Focused  
24 has used?

25 A. I don't recognize this one. It could have been.

1 I don't, I don't even know where you got this one  
2 because I, I don't even recognize the font but  
3 it's not one that I've used in the past  
4 necessarily. I'm not even sure where you got  
5 that from.

6 Q. So this isn't one you're currently using?

7 A. I'm not sure what they're -- I use an iPad so I  
8 basically upload mine on my iPad right now so  
9 it's, mine is an actual app on mine, so right now  
10 like my clients come in and they sign it on an  
11 app.

12 Q. And is that what everybody at Focused Tattoo  
13 uses?

14 A. No. They'll, they'll use consent forms but to be  
15 honest with you, I'm not sure what they're using.  
16 I don't even know where you got that from, like I  
17 said.

18 The one that I've used in the past is  
19 different from this one. I mean it's very  
20 similarly worded, you know, but I don't recognize  
21 this like font and the, the setup of it's  
22 different.

23 Q. Is there anything in here that's not in your  
24 current consent form?

25 A. I would have to have the other consent form right

1 in front of me to answer that question. I don't  
2 know, but I will say that they are similar.

3 Q. Do you notice any differences that you can  
4 identify?

5 MR. ALEXANDER: Objection.

6 Calls for speculation.

7 A. I, I can't say without seeing the other form. I  
8 don't know.

9 Q. And to be clear, this form doesn't mention  
10 copyright, right?

11 MR. ALEXANDER: Objection. The  
12 document speaks for itself.

13 A. I don't see it saying copyright on here, but...

14 Q. Does your current consent form mention copyright?

15 A. The, are you speaking to me about my iPad consent  
16 form?

17 Q. Yeah. Does your iPad consent form mention  
18 copyright?

19 A. I'd have to go take a look at it. I'm not sure.

20 Q. So you don't remember?

21 A. I don't remember, no.

22 Q. Do you remember ever using a consent form that  
23 mentioned copyright?

24 A. I don't remember.

25 Q. Okay. So after the client comes in and signs or

1 the client wants tattooed on their body, is there  
2 anything else that you ordinarily discuss with a  
3 client before you actually ink them?

4 MR. ALEXANDER: Objection.

5 Vague. Form. Calls for speculation.

6 A. Besides the idea of the tattoo and the consent  
7 form? No, not, not really, no.

8 Q. Do you discuss how to take care of the tattoo?

9 MR. ALEXANDER: Objection.

10 Vague.

11 A. After the tattoo, yes.

12 Q. Do you discuss anything else after you ink them?

13 MR. ALEXANDER: Objection.

14 Calls for speculation. Incomplete  
15 hypothetical.

16 A. After we tattoo the customer, we give them their  
17 aftercare instructions and that's pretty much it.  
18 Just tell them how to take care of the tattoo and  
19 that's that.

20 Q. Have you ever told a client that he or she needed  
21 your permission before appearing in a photograph  
22 with a tattoo that you inked on the client?

23 MR. ALEXANDER: Objection.

24 Vague. Calls for a legal conclusion.

25 A. Have I ever? No, I haven't.

1 Q. Have you ever told a client that he or she needed  
2 to get your permission before appearing in a  
3 video with a tattoo that you inked on a client?

4 A. Have I ever --

5 MR. ALEXANDER: Objection.

6 Vague.

7 A. Sorry. Have I ever... no.

8 Q. And have you ever told a client that he or she  
9 needed your permission before the client could  
10 appear in a video game with a tattoo that you  
11 inked on them?

12 MR. ALEXANDER: Objection.

13 Form. Vague. Calls for a legal  
14 conclusion.

15 A. I have not, no.

16 Q. Have you ever told a client that he or she could  
17 not let someone else reproduce their likeness  
18 without your permission?

19 MR. ALEXANDER: Objection.

20 Calls for a legal conclusion. Vague.

21 A. I have not.

22 Q. Have you ever had a client obtain a license from  
23 you before displaying tattoos that you inked on  
24 the client?

25 MR. ALEXANDER: Objection.

1           Calls for a legal conclusion. Vague.

2   A.   I have not.

3   Q.   Have you ever heard anyone at Focused Tattoos  
4       tell a client that they needed permission before  
5       showing their tattoos in a video?

6           MR. ALEXANDER: Objection.

7           Calls for speculation.

8   A.   I don't remember.

9   Q.   Have you ever told -- heard anyone tell a client  
10       that they needed the tattooist's permission  
11       before appearing on Instagram?

12           MR. ALEXANDER: Objection.

13           Form. Vague.

14   A.   I don't remember. I'm not sure.

15   Q.   Do you remember anyone ever telling a client that  
16       they needed permission for appearance in a video  
17       game?

18           MR. ALEXANDER: Objection.

19           Calls for a legal conclusion.

20   A.   For appearance in a video game? Yeah, I'm not  
21       sure.

22   Q.   So why don't you tell clients that they need your  
23       permission --

24           MR. ALEXANDER: Objection.

25   Q.   -- before appearing in any form of media?